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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 107

AARON TURNER,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of Pennsylvania is reported in 358 Pa. 350, 58 A. (2d) 61, and in the Record at page 309. The majority opinion of the court *en banc* refusing a motion for new trial appears in the Record at page 264, the dissenting opinion at page 293.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C. A., Sec. 344(b).

The decision sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, the highest court of that State, affirming a conviction and sentence of death. It was filed on March 23, 1948. On June 11, 1948, there were filed in this Court petitioner's motion for leave to proceed in *forma pauperis* and his petition for certiorari. On June 21, 1948, the Court granted the motion and petition.

Questions Presented

1. Is it a violation of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States to receive in evidence on the trial of a capital case confessions obtained after the accused had admittedly been held by the police for five days without a preliminary hearing, questioned intensively for hours at a time day and night, and were without assistance of counsel, relatives or friends?

2. Is it a violation of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States to receive in evidence on the trial of a capital case the purported confessions and statements of alleged confederates who, although available, were not produced by the Commonwealth so as to accord the accused his right to confront the witnesses against him?

3. Is it violation of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States to fail to furnish the aid of counsel at a magistrate's hearing to one accused of a capital offense?

4. Is it a violation of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States to receive in evidence on the trial of a capital case statements elicited at a preliminary hearing before a magistrate at which time the accused was without counsel, had not been informed of his right to counsel or to cross-

examine the witnesses against him and had claimed in vain his constitutional privilege against self-incrimination?

5. Is it a violation of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States to receive in evidence on the trial of a capital case testimony concerning a purported reenactment of the crime staged without a court order two days after the accused had been committed without bail but was, despite the commitment, still being held illegally by the police without assistance of counsel, relatives or friends?

Constitutional and Statutory Provisions Involved

There are set forth in full in the Appendix to this brief, *infra* pages 44-45, *et seq.* the provisions of the Constitution of the United States and of the Constitution and statutes of Pennsylvania which are pertinent to the issues here involved and upon which petitioner relies.

Statement of the Case

The petitioner is presently confined under sentence of death, having been tried and convicted of first degree murder in the Court of Quarter Sessions of Philadelphia County, Pennsylvania, on September 19-20, 1946.

A motion for new trial was denied by the court *en banc*, one judge dissenting, on February 11, 1947, and, on March 23, 1948, the judgment was affirmed by the Supreme Court of Pennsylvania, one judge noting his concurrence.

The record discloses the following salient facts:

On December 15, 1945, a passing policeman discovered two white men lying unconscious in a small broom factory in Philadelphia (R. 14). Both men subsequently died, the cause of the death of Frank Endres, for which petitioner was tried, being given as "crush of skull" (R. 13).

About six months later, at around 11:00 A. M. on June

3, 1946, petitioner was arrested at 12th and South Streets in Philadelphia (R. 21) and taken to City Hall. Later that same afternoon one Jasper Johnson was also arrested in connection with this crime (R. 22). A third negro, Clarence Lofton had been arrested on May 24, 1946[1] (R. 22).

Petitioner is a young negro, 26 years of age at the time of trial. He is one of eight children and was born and brought up in Marshville, North Carolina, where he went to school up to the sixth grade (R. 111). When his mother died at that time he left school to go to work to support two younger sisters. He worked at a saw mill and on a farm in and around Marshville (R. 111) but finally came to Philadelphia in 1939 where he worked as a longshoreman (R. 111) loading trucks along the waterfront (R. 112). So far as the record discloses, he has no record of any prior convictions or sentences and hence no familiarity with the technicalities and intricacies of criminal law and procedure.

What follows here is undisputed. After Turner's arrest on June 3, 1946, the police admit they "questioned him from that time until he made a statement" (R. 74). He was not taken before a magistrate until about 10:30 A. M. on June 8, 1946 (R. 26) and although at that time he was held without bail the police admit they kept him in their custody and did not deliver him to the county prison until June 12, 1946 (R. 137-138, 180).

Detective O'Mahoney, who had been assigned to the case and who helped make the arrest (R. 22), testified that he

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[1] These three were indicted jointly but a severance was granted and petitioner was tried first for the murder of Frank Endres. Johnson was brought to trial following Turner's conviction, pleaded not guilty, repudiated his alleged confession and raised essentially the same defenses set up by petitioner. Johnson was convicted, sentenced to death and his appeal is now pending in the Supreme Court of Pennsylvania. Lofton, the only one of the three with a criminal record, pleaded guilty and received a life-sentence on the recommendation of the District Attorney because he aided in the "solving of other murders."

questioned Turner for "about three hours" on June 3, "for three hours" on June 4, "maybe four" hours on June 5, "maybe three" on June 6 (R. 28). He said, "I did not time myself. Whatever time I had I went there and talked to him" (R. 28). He also questioned Turner on at least two nights, the 3rd and 7th, for from 2½ to 3 hours on each occasion (R. 31).

It was further admitted that six other officers, Detectives Fisher, Carey, Lennon, Riccardi, Thompson and Lt. Kelly, also questioned petitioner during this five day period, the police taking turns (R. 28) and acting alone and in groups (R. 67). These same officers were present at the magistrate's hearing (R. 30-31), although only Lt. Kelly testified there.

Detective Thompson, who with O'Mahoney arrested Turner on June 3, testified that he questioned petitioner "throughout the entire time (June 3) and four or five days following" (R. 65), including a number of times at night (R. 65-66). Detective Carey testified that he also questioned Turner for about three hours in the evening of June 3 (R. 73) and for about two hours in the afternoon of June 6. In the evening of June 6, Carey said, "I was there about three hours but of course I did not question him during all that time. The other detectives did" (R. 73). On the night of June 7, Carey did question petitioner from "about eight o'clock until about eleven o'clock (R. 71) and, according to the detective, on that night, before the magistrate's hearing, Detectives O'Mahoney, Lennon, Riccardi and Lt. Kelly were also "in and out" trying to get the truth concerning it" (R. 72).

Lt. Kelly, who was in charge of the homicide squad investigating this crime, stated he was unable to recall even approximately how long he had questioned petitioner during the period of his custody (R. 91-92), but Inspector Richardson, the Superintendent of Police, testified that *he*

had been present and actually interviewed the prisoners during "the course of four or five days" (R. 187), although neither the police nor petitioner, when asked concerning this very point, had mentioned ever seeing this top police official at these sessions (R. 28, 31, 66, 71, 72, 114, 118, 119, 122, 124). Richardson testified, however, on direct examination, that: "I would stay sometimes an hour, sometimes two hours, according to how much time I had to stay with them" (R. 186-187). On cross-examination this witness made his participation even greater for "each day", he said, "I would go up in the morning, and I would go up in the afternoon, whenever I had time—three or four times a day I would go up, and at night" (R. 187).

Asked why Turner was not taken before a magistrate on June 3, O'Mahoney said, "We had a lot of questioning to do . . . He did not give us the answers that somebody else told us he could give . . . He did not give the answers the right way" (R. 26). For the same reasons the police held him for the next four days (R. 27). As Detective Carey said, it was because "We questioned him from that time (June 3) until he made a statement" (R. 74).

Lt. Kelly said on this point, "I didn't think it was the proper time to take him before a magistrate. I felt that it would hurt the Commonwealth's case. I was not prepared. There are many thing to be run out. At first opportunity I gave them (Turner, Johnson and Lofton) a hearing" (R. 89). Pressed as to why petitioner was not given an immediate hearing, Kelly said: "That is a hard question to answer directly. He was picked up with "others, some that we wanted and some that we did not want and we had to separate the wheat from the chaff, and when I confronted him with the other defendants they had a lot of trouble trying to straighten out the details among themselves which took a lot of time" (R. 89).

It was admitted, too, that while petitioner was in custody

and before he was given a preliminary hearing, he was moved from the cellroom in City Hall to the police station at 15th Street and Snyder Avenue, where he was kept for "probably a day" (R. 26). O'Mahoney said that was "on orders of Lt. Kelly to have two other men confront him" (R. 32); but there is no further evidence of any confrontation having taken place. Thompson, however, testified that the interrogation continued at the Synder Avenue station and that he and O'Mahoney and Fisher participated in it, both separately and together (R. 66-67). A back room on the second floor was used for this purpose (R. 67).

Lt. Kelly later testified that Turner had been sent to the Snyder Avenue station because he had been attempting to persuade Johnson not to talk and that "He was brought back to City Hall after he had promised not to try to influence other prisoners" (R. 172). But Inspector Richardson testified that Turner asked permission to talk with Johnson to get him to tell the truth (R. 185), that Turner and Lofton "did most of the talking" to Johnson to get him to confess (R. 185) and that actually Turner assisted the police in getting the confession from the other two men (R. 186).

Richardson added, furthermore, that "the three boys made the admission" to him and the other officers "around three or four o'clock on Friday afternoon (June 7)" (R. 186) and that Turner actually told the police that Johnson "was ready to make a clean breast of everything" (R. 186). Nevertheless, according to O'Mahoney (R. 27, 30), and Lt. Kelly (R. 77), it was not until the night of June 7 that petitioner said he wanted to tell the truth. O'Mahoney (R. 31) and Carey (R. 71-72) both testified that they questioned petitioner on the night of June 7 from eight o'clock until eleven and Carey added that Lennon, Riccardi and Lt. Kelly (but not Inspector Richardson) were also "in and out" that night trying "to get the truth" (R. 72).

O'Mahoney stated further that it was not until that night that petitioner was first advised of his constitutional privilege against self-incrimination (R. 30).

Alleged confessions, which were received in evidence over objection and exception (R. 35, 42, 47, 110), were taken from each of the three accused on the morning of June 8, each statement being signed by all three men. O'Mahoney testified that the whole morning was required for this purpose (R. 54) and the purported confessions, from the notation of time on their face, "about 9:45 to 12 noon", would seem to support this (R. 36, 43, 48).

Yet the magistrate's hearing was held on that same Saturday morning, June 8, starting about 10:30 A. M., according to O'Mahoney (R. 26), and the magistrate was then informed that each man had signed a statement (R. 63). Despite this fact, Thompson testified at the trial that he did not think the three statements were completed and transcribed at the time of the hearing (R. 63) and Lt. Kelly could not say that Turner's purported confession had actually been signed at that time (R. 61). Although O'Mahoney said Turner signed "about 10:00 or 10:15" (R. 32), Carey said that petitioner did not sign until sometime after the hearing (R. 72),[2] and although Kelly did say that the taking of the confessions was interrupted for the magistrate's hearing (R. 77), O'Mahoney had no such recollection (R. 54). Later Kelly said the confessions were signed on June 9 (R. 174).

It was admitted that Turner was never warned of his constitutional rights at any time until the night of June 7 (R. 30) and that he never saw a lawyer during the entire period of his custody (R. 28, 67, 72, 86). It was undenied that he never saw anyone other than the police during the

[2] Turner testified he did not sign until sometime between June 10 and June 12, while still in police custody (R. 129).

nine days they held him and that the police tried to get a statement from him by threatening him with the fact that his supposed confederated had "opened up" on him (R. 117, 125).

According to the three alleged confessions, Turner, Lofton and Johnson went to the broom factory where there was "a job to do" (R. 37). Lofton remained outside while the other two went in. Turner hit "the first man" with a piece of iron which he had wrapped in paper and then, while Johnson was going through the man's pockets, petitioner met "the other man", hit him over the head with the iron, took his wallet and left. The three then purportedly split up the money and separated (R. 37, 38).

There was also read in evidence at the trial, over objection and exception, testimony of the three accused taken at the magistrate's hearing (R. 78-82, 110), where none was represented by counsel nor informed of his right to cross-examine. This testimony is generally to the same effect as the events related in the purported confessions.

It appears that at the magistrate's hearing the District Attorney warned the three men they could remain silent, that Johnson and Lofton both testified, and that then Turner was, without more, sworn and questioned as follows (R. 83, see also 57-58):

"Q. Do you want to say anything to his Honor?
A. No, sir.
Q. Can you add anything?
A. No, sir.
Q. You don't want to add anything? Do you agree with the testimony that these two men have given in Court?"

Questioned in this fashion, petitioner told approximately the same story that appears in his alleged con-

fession although it is undisputed that he was seeking to claim his constitutional privilege (R. 146).

Apart from the confessions and the testimony taken at the magistrate's hearing, the only other item of evidence introduced by the Commonwealth at the trial was the report of a so-called reenactment of the crime staged on June 10, after the accused had been committed without bail by the magistrate but while they were still being held by the police. This evidence was introduced over objection and exception (R. 110) principally through the testimony of Detective Sergeant Riccardi (R. 93) who related how Johnson and Lofton reenacted the events of December 15, 1945, and that Turner, when questioned at the broom factory, replied, "I have nothing to say" (R. 96).

Riccardi said he had been present at the taking of the confessions and at the magistrate's hearing (R. 93) and hence he knew that the case had been "broken" and the suspected perpetrators ordered committed to the county prison. When asked why, despite this, it was thought necessary to have a reenactment of the crime, he stated frankly, "Well, it is a matter of evidence in our homicide case" (R. 97).

Petitioner took the stand in his own behalf at the trial. He told a detailed story of his arrest and of the brutal physical and mental duress to which he was subjected (R. 113 **et seq.**) in order to extract a confession. So much of this story as has to do with the use of physical violence only is denied by the police. According to petitioner, however, his torment began very shortly after he was picked up (R. 113). He said that he was kicked in the legs (R. 113, 115, 120), punched in the stomach (R. 115) and brought to his knees by having his arm twisted (R. 115). When he begged Detective Thompson not to kick him because of a hernia, he was told, "... your guts will be hanging out before I get through with you" (R. 115). Later in his

interrogation he was admonished by Sgt. Riccardi to "answer the questions right" by being punched in the face (R. 117). More than once he was made to stand spread-eagled and if he permitted his outstretched hands to fall he was hit on the hands and wrists with a stick (R. 120, 131). The same procedure was repeated at the second police station to which he was taken where he was hit from behind, punched in the face, beaten with a chair and had his arm twisted (R. 122-123).

Petitioner testified that he was constantly urged "to come along", to talk, and was threatened with further beatings because he was "lying" (R. 125-126) and with being removed again from City Hall (R. 126). He was told by Lt. Kelly that he was "very stubborn" and that the Lieutenant had no "use for niggers anyhow" (R. 130) and that "He said if he had his way with me he would throw me down the damn elevator and make me break my neck" (R. 130). At one point, Detective O'Mahoney told Detective Carey, a negro, that "he could go out and eat" because O'Mahoney "didn't want to see a black man beat a black man" (R. 131).

Petitioner denied that Johnson and Lofton signed their confessions in front of him (R. 141) or that he knew when they had signed (R. 140) or that he ever signed his alleged confession before the magistrate's hearing (R. 140). He admitted his signature but when asked why he had signed the statements, said, "I had to sign it" (R. 144), and "I had to say it" (R. 145). He related how Detective Thompson gave him a drink of whiskey before the magistrate's hearing to "get your nerve up" (R. 126). He said that at the hearing there was "No one around but detectives and me" (R. 145); that he said nothing about his beating because he was scared (R. 146) and that although he did not want to testify at the hearing he thought he had to when the District Attorney questioned him (R. 146).

Turner denied absolutely any participation whatever in the crime (R. 149). He said he could not remember where he was on December 15, 1945, it being ten months before, but denied absolutely being anywhere near the broom factory then or at any other time (R. 133) except when the police took him there. He said he never saw anyone other than the police during his custody (R. 133).

The only other witness called by the defense was petitioner's financee, Mazy Brown, who testified she had seen Turner on the morning of June 3, 1946, before his arrest at which time he had no marks or bruises (R. 158). She received a letter from him dated June 13, 1946, from the county prison and visited him there on June 17, when she noticed his lip was swollen, there were "wounds on his leg" and a "knot" on his hand (R. 160-161). She also described her futile attempts to find a lawyer to aid petitioner. One lawyer asked a fee of one thousand dollars, the Legal Aid advised her it did not handle murder cases and she was equally unsuccessful at the National Association for the Advancement of Colored People (R. 162-163).[3a]

In rebuttal, the Commonwealth called the various police officers involved who denied the use of any physical violence and asserted, on the contrary, that on the night before the accused confessed they were given pie and ice cream (R. 173) and that on Sunday, June 9, his day off, Detective Fisher asked special permission to take the prisoners home cooked food (R. 169, 174).

The trial judge specifically refused to charge the jury that it could consider the prolonged detention of petitioner in determining the voluntary character of the alleged con-

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[3] Petitioner's present counsel were appointed on July 6, 1946, pursuant to the Act of March 22, 1907, P.L. 31, 19 Purdon's § 784, which required petitioner to file an affidavit that he was destitute of means to employ counsel. It will be recalled that the magistrate's hearing was held on June 8, 1946.

fessions (R. 204, 212) after having previously refused to consider that detention as a ground for objection to their admission in evidence (R. 35, 42). So, too, with the petitioner's right to counsel at every stage of the proceedings in a capital case (R. 42, 204, 205, 212) and with his privilege against self-incrimination (R. 58, 209). The trial judge also refused to charge the jury to disregard the evidence obtained at the alleged reenactment of the crime staged without court order after petitioner and his purported confederates had been committed without bail (R. 211, 212, 203).

Subsequent to the jury's verdict of guilty, a majority of the court *en banc* denied petitioner's motion for new trial. To the argument that the confessions were inadmissible because the *admitted facts* showed an inherently coercive situation, the court answered that the *disputed facts* were properly submitted to the jury (R. 278). To the argument that petitioner's prolonged detention for the admitted purpose of extracting a statement from him rendered his confession inadmissible, the court replied that it was a matter for the jury to consider (R. 268-269) although instruction on this point had been refused (R. 204, 212). To petitioner's claim that he had a constitutional right to have a lawyer *appointed* for him at the preliminary hearing on a capital offense whether or not he requested it, the court said the question whether he had *requested* counsel was for the jury to determine (R. 282). Although it is undisputed on the record (R. 58, 146) that petitioner wanted and tried to exercise his constitutional privilege to remain silent at the magistrate's hearing but was questioned anyhow, the court held that he was entitled to his privilege if he claimed it (R. 285) but that he did not claim it (R. 286). As to the police holding petitioner and his alleged confederates, after their commitment without bail, in order to stage a reenactment to obtain further evidence, the court said such prac-

tice was improper and illegal if done against the will of the accused, but that it was not shown to be involuntary and moreover it was not prejudicial since there was no showing that the jury was swayed by the evidence thus introduced (R. 288-289).

One judge of the court *en banc* dissented on the ground that the undisputed facts showed as a matter of law "that there was no free and voluntary confession" (R. 295) and that the case came within the purview of *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *White* v. *Texas*, 310 U. S. 530; *Ward* v. *Texas*, 316 U. S. 547; *McNabb* v. *United States*, 318 U. S. 332; *Anderson* v. *United States*, 318 U. S. 350; and *Malinski* v. *New York*, 324 U. S. 401. It was said that the time has come "when the third degree, or any of its euphemistic alternatives is branded the evil "that it is" (R. 296).

In affirming the conviction and sentence, the Supreme Court of Pennsylvania held that "Anyone with experience in the administration of criminal law" who reads petitioner's confession "will readily conclude" that it was not coerced, but is true and was properly submitted to the jury (358 Pa. 350, 355; R. 313). It was stated that "Anyone believing Turner's later assertions that he had been coerced into making his incriminating statements about the commission of these murders would be too credulous to be safely entrusted with any part in the realistic work of administering the criminal law with justice both to the accused and to society" (358 Pa. 350, 363; R. 319, 320).

On the problem of prolonged detention the court said there was nothing wrong under the Pennsylvania Constitution or statutes in holding a "murderer" five days in order to question him (358 Pa. 350, 356; R. 313, 314) but even if it were "technically" wrong, "it does not follow that under the American constitutional system society must be more grossly wronged by having the prisoner turned

loose upon it after he has confessed his guilt" (358 Pa. 350, 367; R. 324).

The question of right to counsel was treated by the court in a footnote in which it was said that the Pennsylvania statutes requiring counsel to be appointed at trial had never been interpreted to furnish counsel as soon as an accused is taken into custody.

The right to counsel under the Pennsylvania Constitution and the Fourteenth Amendment is not mentioned nor is the question of constitutional privilege against self-incrimination or of constitutional right to confront witnesses. The evidence obtained at the alleged reenactment of the crime is accepted by the court as a further evidence of guilt (358 Pa. 350, 368; R. 323) and no mention whatever is made of the asserted violation of due process arising from the police holding petitioner and his purported confederates for another four days after their commitment by the magistrate, making a total of nine days in all that they were held incommunicado.

Petitioner has throughout the trial and appeal asserted and sought to protect his constitutional rights under the Fourteenth Amendment. When the Commonwealth first attempted to have petitioner's alleged confession read in evidence an objection was made (R. 35) which was immediately overruled. Thereupon counsel attempted to bring to the court's attention the reasons for the objection and the rulings relied upon in support thereof (R. 35). The trial judge cut off such a statement, however, by announcing, "I am ruling here and I have made my ruling" (R. 35). When the District Attorney then asked to have the alleged confession of Jasper Johnson read in evidence counsel renewed the attempt to state for the record the reasons for petitioner's objection (R. 42) but the trial judge again stopped this by stating, "That is purely argumentative" (R. 42). An exception, however, was granted (R. 42).

The court having thus indicated the manner in which it desired objection to be noted, counsel thereafter did not persist in attempting to state in detail all the reasons relied upon but simply made his objection and was granted exception to the admissibility of the purported confession of Clarence Lofton (R. 47). As to the admission of the testimony elicited at the magistrate's hearing, it was pointed out to the trial judge that petitioner's statement was obtained in violation of his constitutional privilege against self-incrimination (R. 68), and repeated objections were made to the receipt of all this line of evidence (R. 78, 82, 83, 85). Exception was noted to all of these matters and to the admission of the testimony relating to the so-called reenactment of the crime (R. 110).

At the close of the case in the trial court, petitioner presented numerous points for charge, reiterating his contentions that the alleged confessions were obtained in a coercive situation and hence violated his constitutional rights (R. 208-209, 211), that the testimony elicited at the magistrate's hearing and subsequently introduced at the trial was secured in violation of his constitutional privilege against self-incrimination (R. 209-210), that the use of the alleged confessions of Johnson and Lofton violated petitioner's constitutional right to confront the witnesses against him (R. 210), and pointing out that petitioner had been denied a prompt preliminary hearing, the assistance of counsel before the magistrate and had been improperly detained by the police following his commitment without bail (R. 212). All of petitioner's requests for charge were refused by the trial judge (R. 203-205).

After the jury's verdict of guilty, petitioner moved for a new trial and assigned as error the admission of the alleged confessions, the testimony secured at the magistrate's hearing and at the so-called reenactment of the crime (R. 213-264), thereby raising again the substance

of his contentions. The constitutional questions now raised were then argued at length and, as has been described above, the court en banc divided on the problems in its majority (R. 264) and dissenting (R. 293) opinions. There followed an appeal to the Supreme Court of Pennsylvania in which the assignments of errors was repeated (R. 298) and, pursuant to the rules of that court, there was included in petitioner's brief a "Statement of Questions Involved", which again set forth the federal questions in the case upon which grounds the appeal was based (R. 297). The Supreme Court of Pennsylvania, as related above, affirmed the judgment and sentence (358 Pa. 350; R. 309).

ARGUMENT

Petitioner contends that the due process clause of the Fourteenth Amendment is violated when the police take into custody a person accused of murder and hold him incommunicado for nine days, question him intensively in groups and in relays for hours at a time day and night, move him from one police station to another, delay his preliminary hearing before a magistrate for five days for the admitted purpose of extracting a confession from him, and then, after his commitment to the county prison by the magistrate, hold him without court order for another four days so as to stage a reenactment of the crime for the admitted purpose of getting further evidence against him. When there are added to these undisputed facts the further admitted facts that at the magistrate's hearing, when it was finally held, the indigent accused was not furnished counsel, was not advised of his right to counsel or his right to cross-examine witnesses against him and was denied his privilege against self-incrimination, then petitioner submits all the evidence obtained under these circumstances is inadmissible at the trial of the murder indictment.

Despite objection, the confession, the testimony of the magistrate's hearing and of the reenactment were all admitted at petitioner's trial, and it is now submitted that "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death" (*Chambers* v. *Florida*, 309 U. S. 227, 288; *White* v. *Texas*, 317 U. S. 530, 533).

I

The Admission in Evidence of Petitioner's Alleged Confession Violated His Rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Both the court en banc (R. 279) and the Supreme Court of Pennsylvania (358 Pa. 350, 354, 361, 362) took the view that the voluntary character of the confessions turned on a disputed issue of fact and hence that was for the jury to determine.[4] Both courts, however, simply ignored and failed even to mention the argument petitioner has advanced on the basis of facts which are not in dispute at all but which are, on the contrary, admitted by the police themselves. We believe that a mere recital of those facts, as set forth above, makes it self-evident that the course of conduct pursued by the police was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear" (*Ashcraft* v. *Tennessee*, supra at p. 152).

[4] The only dispute was about the use of *physical violence*, which petitioner asserted and the police denied, and, of course, "such disputes . . . are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime . . . ." (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 152).

The principle we here invoke is that stated by this Court in *Lyons* v. *Oklahoma*, 322 U. S. 596, 602:

> "When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

And, as was said in *Lisenba* v. *California*, 314 U. S. 219, 240:

> ". . . when a prisoner held incommunicado is subjected to questioning by officers for long periods and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means."

(See also *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Chambers* v. *Florida*, supra at p. 227; *Ward* v. *Texas*, 316 U. S. 547, 550; *Ashcraft* v. *Tennessee*, supra at pp. 147, 148; *Malinski* v. *New York*, 324 U. S. 401, 404; *Haley* v. *Ohio*, 332 U. S. 596, 599).

We believe that the independent examination, which this Court has said is its duty to make, will demonstrate from the undisputed evidence "that force or coercion was used to exact the confession" (*Haley* v. *Ohio*, supra) and hence that petitioner's conviction cannot stand. The admissions of the police themselves bring this case squarely within the host of decisions, the principles of which are summarized in *McNabb* v. *United States*, 318 U. S. 322, 340:

> "* * * this Court has, on Constitutional grounds, set aside convictions, both in the Federal and State Courts, which were based upon confessions *secured by protracted and repeated questioning of ignorant and untutored persons*, in whose minds the power of officers was greatly magnified: Lisenba v. California,

314 U. S. 219, 239, 240, 86 L. Ed. 166, 181, 182, 62 S. Ct. 280, or *'who have been unlawfully held incommunicado without advice of friends or counsel'*: Ward *v.* Texas, 316 U. S. 547, 555, 86 L. Ed. 1663, 1667, 62 S. Ct. 1139; and see Brown *v.* Mississippi, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; Chambers *v.* Florida, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472; Canty *v.* Alabama, 309 U. S. 629, 84 L. Ed. 988, 60 S. Ct. 612; White *v.* Texas, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032; Lomax *v.* Texas, 313 U. S. 544, 85 L. Ed. 1511, 61 S. Ct. 956; Vernon *v.* Alabama, 313 U. S. 547, 85 L. Ed. 1513, 61 S. Ct. 1092." (Italics supplied.)

See also *Ashcraft* v. *Tennessee*, *Lyons* v. *Oklahoma*, *Malinski* v. *New York*, and *Haley* v. *Ohio*, supra.

Thus, even if we lay aside the controverted evidence on physical mistreatment, as was done in *Ward* v. *Texas*, *Ashcraft* v. *Tennessee*, *Malinski* v. *New York* and *Haley* v. *Ohio*, the record in the present case reveals the deliberate use of almost every reprehensible and indefensible practice which this Court has condemned as repugnant to the Constitution. In outlawing these "easy but self-defeating ways" of law-enforcement (*McNabb* v. *United States*, supra at p. 344), the presence of anyone of these grounds has been sufficient cause for reversing convictions and, as in *Ward* v. *Texas*, supra at p. 555, "All of them are to be found in this case."

An essential part of the procedure followed by the police in order to procure a confession from petitioner was the denial of a prompt preliminary hearing before a magistrate. It will be recalled that the police admit that the hearing was delayed five days because "We had a lot of questioning to do" (R. 26), because "He did not give the answers the right way" (R. 26), because "He did not give us the answers that somebody else told us he could give" (R. 26), because there was "a lot of trouble trying to straighten out the details" (R. 89), because "We ques-

tioned him from that time (June 3) until he made a statement" (R. 74). Such a course of conduct is characterized bluntly by Chief Judge Lehman of New York as quoted in *Malinski* v. *New York*, 324 U. S. 401, 417, n. 1:

> "The conclusion is inescapable that the police delayed the arraignment of the defendant 'for the purpose of subjecting him to an inquisition impossible thereafter'."

Were this a case arising in the federal courts there could be no doubt that the conviction could not stand against the rule of *McNab* v. *United States*, supra, and *United States* v. *Mitchell*, 322 U. S. 65, which forbids "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure." The Supreme Court of Pennsylvania, however, has rejected for Pennsylvania the authority and applicability of the *McNabb* rule on the ground that it applies only to proceedings in the federal courts (358 Pa. 350, 358). Yet in at least two cases arising from state courts under the Fourteenth Amendment, *Ashcraft* v. *Tennessee* and *Malinski* v. *New York*,[3] supra, this Court has reversed convictions obtained by the use of confessions extracted after prolonged detention of the accused, and, even more recently, in *Haley* v. *Ohio*, supra, there has been a further strong intimation that the question of unreasonably long detention is a matter for consideration under the Due Process clause.

There is certainly considerable support for the belief that the right to a prompt preliminary hearing is such an "impressively pervasive requirement of criminal procedure"

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[3] In the *Ashcraft* case the accused was detained by the police for 36 hours before being granted a preliminary hearing. In the *Malinski* case, a confession obtained after ten hours detention was held inadmissible.

(*McNabb* v. *United States*, *supra* at p. 343) that it must be considered among "the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'" (*Herbert* v. *Louisiana*, 272 U. S. 312, 316; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; *Mooney* v. *Holohan*, 294 U. S. 103, 112; *Buchalter* v. *New York*, 319 U. S. 427, 429; *Bute* v. *Illinois*, — U. S. —, 16 Law Week 4313, 4315). See for instance in addition to the illuminating discussion in the *McNabb* case, Section 35 of the Code of Criminal Procedure (1930) prepared by the American Law Institute, and the Commentaries thereto; Report on Lawlessness in Law Enforcement (1931) by the National Commission on Law Observance and Enforcement (the Wickersham Report), pp. 31, 33, 34;[6] McCormick, "Some Problems and Developments in the Admissibility of Confessions", 24 Texas L. Rev. 239, 243; *Schabert* v. *Minnesota*, 218 Minn. 1, 6, 15 N. W. 2d 585, 587, 588; *Runnels* v. *United States*, 138 F. 2d 346, 347.

Even if such a conclusion unduly extends the implications of this Court's decisions and "the effect of a mere denial of a prompt examining trial is a matter of state, not of federal law" (*Lyons* v. *Oklahoma*, 322 U. S. 596, 597 n. 2), still it is clear that the fact of prolonged detention will be considered as affecting the voluntary nature of a confession (*Lyons* v. *Oklahoma*, *Haley* v. *Ohio*, *supra*). And it is believed there would be no dissent from the view expressed by Chief Judge Lehman quoted with approval in *Malinski* v. *New York*, 324 U. S. 401, 417, n. 1:

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[6] The Wickersham Report, pp. 113-115, also reveals a long-standing practice among the Philadelphia police to detain an accused in "cold-storage." To the same effect is the Report of the Crimes Survey Committee of the Law Association of Philadelphia (1926) pp. 466-468. Attention is also invited to a speech quoted in the Appendix hereto, *infra*, p. 49, by Lemuel B. Schofield, Esquire, to the Philadelphia Bar Association on December 15, 1939.

"There can be no fair trial of the issue whether the confession is voluntary where the jury is not properly informed that the detention was unlawful and that they must take that fact into consideration."

It is a paradox that in the present case the trial judge specifically refused to charge the jury on the question of detention (R. 204, 212) and yet thereafter, writing on behalf of a majority of the court en banc in rejecting a motion for new trial, specifically recognized that "It is one of the elements to be considered" (R. 268, 269). Equally puzzling is the fact that the Supreme Court of Pennsylvania also took the view that the jury "acting under proper instructions" (358 Pa. 350, 365; R. 322) is the tribunal to pass on the voluntariness of a confession but failed to recognize the fact that the jury was denied instruction on detention.

We are driven to the conclusion that both courts were strongly moved by an assumption of the conclusion that petitioner is guilty. Thus, in refusing the point for charge, the trial judge commented (R. 204):

"You do not presume to think if they were wrong in delaying the hearing four or five days that it would affect the question of whether he is or is not guilty?"

And the Supreme Court of Pennsylvania said (358 Pa. 350, 356; R. 313, 314):

"There is nothing in the constitution or the statutes of Pennsylvania or in the decisions and opinions of this court during the two and a quarter centuries of its existence, requiring that *a convicted murderer* be turned loose merely because he has not been taken before a magistrate immediately after his arrest or because he was held five days in jail and interrogated a few hours each day without being given an opportunity to consult with counsel or with friends." (Italics supplied.)

Again the court said (358 Pa. 350, 367; R. 324):

> "Even if it should be decided in a given case that a prisoner had been technically wronged by an officer's refusal to take him before a committing magistrate almost immediately after his arrest for a felony, it does not follow that under the American constitutional system society must be more grossly wronged by having the prisoner turned loose upon it after he has confessed his guilt. Just as in morals 'two wrongs do not make a right', so in law committing a wrong against an accused cannot be righted by committing a wrong against society."

This process of reasoning ignores, of course, the entire question of whether the confession is a voluntary one or not, and would lead to the startling conclusion that so long as a confession is "true" and the accused is "guilty", it is immaterial how the confession and the conviction are secured. Such a view is contrary to the principle, enunciated in *Lisenba* v. *California*, 314 U. S. 219, 236, that:

> "The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false."

Although the Supreme Court of Pensylvania fails to refer to it, there is authority in that state which accepts the "impressively pervasive" view of the requirement of a prompt preliminary hearing. Indeed, in the survey of the state statutes made in *McNabb* v. *United States*, 318 U. S. 332, 342, n. 7, Pennsylvania is recognized as having "similar legislation, requiring that arrested persons be promptly taken before a committing authority." The statutes thus refered to are the Act of March 31, 1860, P. L. 427, §3, as amended by the Act of May 2, 1899, P. L. 173, § 1, 19 Purdon's §3; and the Act of April 23, 1909, P. L. 141, § 1, 19 Purdon's § 4. These acts are set out in the Appendix.

infra, p. 46, along with a third statute which is peculiarly applicable to the present case since it sets forth the duties of the Philadelphia police. The Act of April 20, 1869, P. L. 1187, § 1, 53 Purdon's § 6858, provides, in the familiar terms of such legislation, that officers making arrests in Philadelphia shall take the person arrested for a hearing to the nearest magistrate. The penalty for failure to comply with the act is a fine of fifty dollars and dismissal from office. Although no time is stated in the act, it is nevertheless implicit in such statutes that the arresting officer must act promptly and without unnecessary delay (*McNabb* v. *United States*, *Runnels* v. *United States*, *Schabert* v. *Minnesota*, *supra*).[7]

These Pennsylvania statutes appear not to have been construed but the Supreme Court of Pennsylvania itself recognized the principle involved more than a half a century ago. *Burk* v. *Howley*, 179 Pa. 539, 36 Atl. 327, was an action for damages for false imprisonment brought by a woman arrested without a warrant on a charge of theft and held by the police for eight days. In affirming a judgment for substantial damages the Supreme Court of Pennsylvania commented on the detention (p. 550):

> ". . . (the) purpose was to extort a confession of guilt, a revival in somewhat milder form of the rack and thumbscrew process to establish crime and just as flagrantly unlawful . . . The court (below) said that while an arrest, on an exigency where reasonable grounds of suspicion existed, might be made, it was the duty of the person or officer making the arrest to take the accused before a magistrate for formal accusation and hearing . . . In this there was no error . . .

[7] In the speech cited in footnote 6 and quoted in the Appendix, *infra*, p. 49, Mr. Schofield, a former First Assistant District Attorney and Director of Public Safety of Philadelphia, referring to the Act of April 20, 1869, P.L. 1187, states: "I doubt if there is a statute on our books which is more consistently violated. Were it strictly enforced half the Philadelphia police force would be out of employment. . . ."

> But why detain her in a cell for more than a week? Obviously because there were no reasonable grounds for suspicion on which to base an information. (The) whole subsequent conduct shows that the imprisonment was prompted for the purpose of extorting an admission, without which there was no reasonable ground to suspect guilt. Clearly, if the exigency called for a sudden arrest without warrant, no such exigency exists for the eight days following, every hour of which was an illegal detention."

Petitioner contends that his illegal detention coupled with the circumstances under which his alleged confession was obtained was so inherently coercive that the mandate of the Due Process clause requires that his conviction be reversed. This conclusion, it is submitted, is inescapable "even though without the confession there might have been enough evidence for submission to the jury. *Malinski* v. *New York*, *supra*, p. 404, and cases cited". (*Haley* v. *Ohio*, 332 U. S. 596, 599, 606).

II

The Admission in Evidence of the Alleged Confessions and Statements of Petitioner's Purported Confederates Violated His Rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

What has gone before is equally applicable to the alleged confessions of petitioner's purported confederates, Johnson and Lofton. Lofton was arrested by the police on May 24, 1946 (R. 22), Johnson on June 3, 1946 (R. 22), and both were held along with petitioner and subjected to the same "hydraulic" process by the police (R. 89, 90, 94, 184-187). Moreover, since all three men signed all three "confessions", both the lower court (R. 279-281) and the Supreme Court of Pennsylvania (358 Pa. 350, 368) treated the three

documents as petitioner's confessions and, therefore, admissible as such. Conversely it would follow that the exclusion of one would necessitate the exclusion of all three.

The peculiar vice in the use of the alleged confessions of Johnson and Lofton lies in the fact that they were never called personally as witnesses by the Commonwealth although they were available and were actually produced in court by the District Attorney for identification purposes (R. 175). In this fashion petitioner was deprived of his opportunity and right to confront and cross-examine the witnesses against him (see Petitioner's Point for Charge No. 11, R. 210). This grievous error was greatly aggravated by the further fact that the trial judge received, over objection and exception, a report of the testimony Johnson and Lofton gave at the magistrate's hearing (R. 56, 57, 78, 81, 85, 110) when petitioner did not have and was not advised of his right to counsel or of his right to cross-examine the witnesses against him.

This ruling, which the Supreme Court of Pennsylvania tacitly approves, is flatly contradictory to the only other decision in Pennsylvania which has ever considered the problem. *Commonwealth* v. *Lenousky*, 206 Pa. 277, 55 Atl. 977, cited with approval in *Commonwealth* v. *Westwood*, 324 Pa. 289, 303, 188 Atl. 304, 310, holds, on what was referred to as "a question of grave importance in the criminal law," that on the trial of an indictment for murder, the testimony of a witness, who was absent at the trial but who testified at the preliminary hearing, is inadmissible when the accused was not represented by counsel before the magistrate and was not informed of his right to cross-examine the witnesses against him. The rationale behind the decision is obviously the right of an accused to confront the witnesses against him which is guaranteed by Article 1, §9 of the Constitution of Pennsylvania and which has been assumed to be "reinforced by the Fourteenth Amend-

ment" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 106; *Re Oliver*, U. S. , 92 L. Ed. 491, 500). We submit, therefore, that in denying petitioner his right in this respect the Fourteenth Amendment was violated.

III

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Required That Petitioner Be Furnished Counsel at the Preliminary Hearing of a Capital Case.

This being a capital case involving an indigent accused, it comes directly within the requirement reiterated most recently in *Bute* v. *Illinois*, U. S. , 16 Law Week, 4313, 4323, in which it was said:

> ". . . this Court repeatedly has held that failure to appoint counsel to assist a defendant . . . where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. *Carter v. Illinois*, 329 U. S. 173, *Hawk v. Olson*, 326 U. S. 271; *Tompkins v. Missouri*, 323 U. S. 485; *Williams v. Kaiser*, 323 U. S. 471; *Powell v. Alabama*, 287 U. S. 45; *Moore v. Dempsey*, 261 U. S. 86. See also, *DeMeerleer v. Michigan*, 329 U. S. 663 (convicted of first degree murder and sentenced to life imprisonment).

The "classic statement" of the requirement is that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him" (*Powell* v. *Alabama*, *supra*, at p. 69), and the simple question here is whether a preliminary hearing before a magistrate is a "step in the proceedings against him." Just to put the question would seem sufficient to bring an affirmative answer and there can be no possible doubt that such is the case in Pennsylvania where the Constitution provides,

in Article V, Sec. 1, that the judicial power of the State shall be vested in magistrates' courts as well as in other courts. Furthermore, Article V, Sec. 12 of the Pennsylvania Constitution establishes a system of minor courts for Philadelphia County.

The Supreme Court of Pennsylvania has had occasion to consider the question of whether the magistrates' courts are part of the judicial system, and, in *McNair's Petition*, 324 Pa. 48, 53, 187 Atl. 498, 501, it was said:

> "These courts are of a subordinate nature and limited jurisdiction but their importance in our system of jurisprudence, as well as the English system in which they had their origin, cannot be ignored. Within the sphere of their powers, they have all the attributes of legally constituted courts of justice and are independent of any other tribunal except insofar as their action is reviewable on appeal . . . ."

This Court has not, we believe, been asked before to pass upon the specific question of the right of an accused in a capital case to be furnished counsel, whether he requests it or not, at a preliminary hearing. That the right extends this far, has, however, been expressly ruled in *Wood* v. *United States*, 128 F. 2d 265, the opinion in which was written by Mr. Justice Rutledge when sitting on the United States Court of Appeals for the District of Columbia. It is there said that the preliminary hearing "performs a judicial though limited function" and is "a stage of 'the proceedings against' the accused" (p. 275) and that "the accused is entitled to have counsel at the hearing" (p. 271).

The *Wood* case has been cited with approval in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154 n. 10, and in *Edwards* v. *United States*, 139 F. 2d 365, 367, 368, cert. denied 321 U. S. 769. Compare *Canizio* v. *New York*, 327 U. S. 82, 91, and see *contra*, *Burrall* v. *Johnson*, 141 F. 2d 230, cert. denied 325 U. S. 887. It is also supported by Section 39 of the

Official Draft of the Code of Criminal Procedure (1930) adopted by the American Law Institute, and by a majority of the state decisions referred to in the Commentary thereto.

It should be added that, generally speaking, those state decisions which have denied the right,[8] turn upon two grounds: the fact that a preliminary hearing is not a "trial" within the meaning of the particular state constitution, or that a magistrate has no power to appoint counsel. It has been pointed out above that in Pennsylvania the magistrate's hearing is made by the Constitution a part of the judicial process and that the office of magistrate is a judicial one. It follows necessarily, then, that a preliminary hearing is a "trial" and that a magistrate in his judicial capacity has an inherent right to appoint counsel for a person appearing before him charged with a capital offense.

"Every court", it was said in *Betts* v. *Brady*, 316 U. S. 455, 471, 472, "has power, if it deems proper, to appoint

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[8] *Withers* v. *States*, 36 Ala. 252, 264 (1860); *Blanks* v. *State*, 30 Ala. App. 519, 8 So. 2d 450 (1942); *State* v. *Calkins*, 63 Idaho 314, 120 P. 2d 253 (1941); *Milller* v. *State*, 29 Neb. 437, 441 (1870); *Roberts* v. *State*, 145 Neb. 658, 17 N. W. 2d 666 (1945); *State* v. *Murphy*, 87 N.J.L. 515, 94 Atl. 640 (1915); *Lambus* v. *Kaiser*, 352 Mo. 122, 176 S. W. 2d 494 (1943); *Skiba* v. *Kaiser*, 352 Mo. 424, 178 S. W. 2d 373 (1944); *State* v. *Graves*, 352 Mo. 1102, 182 S. W. 2d 46 (1944); *State* v. *Crank*, 105 Utah 332, 142 P. 2d 178 (1943). Compare also *People* v. *Brooks*, 72 Cal. App. 2d 657, 165 P. 2d 51 (1946).

Cases in state courts deciding or intimating that the constitutional right to counsel extends to the preliminary hearing are: *Phillips* v. *State*, 162 Ark. 541, 547, 258 S. W. 403, 405 (1924); *People* v. *Elliott*, 80 Cal. 296, 299, 22 P. 207, 209 (1889); *People* v. *Napthaly*, 105 Cal. 641, 39 P. 29 (1895); *Batchelor* v. *State*, 189 Ind. 69, 76, 125 N. E. 773, 776 (1919); *State* v. *Moore*, 61 Kan. 732, 734, 60 P. 748, 749 (1900); *Crebs* v. *Hudspeth*, 160 Kan. 650, 164 P. 2d 338 (1946), cert. denied 328 U. S. 857; *People* v. *Moore*, 62 Mich. 496, 502, 29 N. W. 80, 82 (1896); *Ex parte Bedard*, 106 Mo. 616, 622, 17 S. W. 693, 694 (1891); *People* v. *Risley*, 66 How. Pr. 67 (N. Y. 1883); *People* v. *Fuller*, 68 N.Y.S. 742 (1901); *Harris* v. *Rolette County*, 16 N. D. 204, 112 N. W. 971 (1907); *Polk* v. *State*, 126 Okl. Cr. 283, 224 P. 194 (1924); cf. *People* v. *Johnson*, 2 Wheeler Cr. C. 361 (N. Y. 1824), decided before the Bill of Rights incorporating the right to counsel was added by the New York Constitution of 1846.

counsel where that course seems to be required in the interest of fairness." And the existence of this power is recognized in Pennsylvania (*Commonwealth* v. *Richards*, 111 Pa. Super. 124, 129, 169 Atl. 464, 465; *Commonwealth ex Rel. Schultz* v. *Smith*, 139 Pa. Super. 357, 362, 11 A. 2d 656, 658).

In the present case the Supreme Court of Pennsylvania has dismissed this vital *constitutional* question in a brief footnote which observes merely that the Pennsylvania *statutes* speak only in terms of assigning counsel at trial. But, as pointed out in *Wood* v. *United States supra* at p. 271:

> "The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at trial . . ."

It is readily apparent that petitioner suffered great prejudice because he was without counsel at the magistrate's hearing. In the first place, he, a young, poor, uneducated negro who had only attended school up to the sixth grade, was being confronted with the gravest of all felony charges, murder. This is the typical factual situation which has led to the formulation of the rule providing counsel, since it flies in the face of reality to suppose that an uneducated layman could alone fairly meet such an accusation (*Powell* v. *Alabama*, *Williams* v. *Kaiser*, *Tompkins* v. *Missouri*, *supra*). Moreover, the circumstance of petitioner's arrest and detention are properly to be considered in this regard, since coercive practices may in themselves create a need for the assistance of counsel, quite apart from the personal capacities of the accused or the nature of the charge made against him (*cf. Smith* v. *O'Grady*, 312 U. S. 329; *Ex Parte Hawk*, 321 U. S. 114).

Specifically, petitioner was prejudiced by being without counsel at the magistrate's hearing in that he was thereby

deprived of his right to cross-examine the witnesses against him. The magnitude of this lost opportunity is made clear when it is remembered that the only persons supposedly having actual knowledge of petitioner's alleged participation in the crime charged were Johnson and Lofton, and the only time they appeared in person as witnesses against petitioner was at the preliminary hearing. Therefore, by not being informed of his right to cross-examine them at that time and by not being furnished counsel who would have been able to secure this right for him, petitioner was unfairly deprived of the only chance he has ever had to elicit the truth from these witnesses. Similarly, petitioner was deprived of the incalculable benefit of being able to cross-examine the police contemporaneously with the events of which he now complains. It is certainly not inconceivable that an interrogation at that time would have adduced even more details of the coercive practices adopted by the police than are now in the present record.

Moreover, the assistance of counsel at that stage in the proceedings against him would have enabled petitioner to make an intelligent choice between claiming his constitutional privilege to remain silent and taking the stand to testify in his own behalf. If petitioner had chosen to exercise his privilege, the assistance of counsel would have prevented him from being compelled to testify against himself which, it is submitted, he was made to do. On the other hand, the assistance of counsel would have enabled him, had it been so decided, to take the stand at the preliminary hearing and then and there repudiate the confession and, contemporaneously with the event, tell his story of coercion and violence and exhibit his bruises to the magistrate.

Finally and equally important with the foregoing, the assignment of counsel at that stage would have protected petitioner from being held improperly and illegally by the police for another four days in order to secure more "evi-

dence in our homicide case" (R. 97) after he had been committed without bail by the magistrate. (See infra Point V, p. 38.)

In view of all these facts it cannot be doubted that "natural, inherent, and fundamental principles of fairness" required the appointment of counsel for petitioner at the preliminary hearing before the magistrate (*Betts* v. *Brady*, 316 U. S. 455, 464; see also the dissenting opinion in *Bute* v. *Illinois*, *supra* at p. 4324).

IV

The Admission in Evidence of Statements Elicited at the Magistrate's Hearing Violated Petitioner's Rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In *Wood* v. *United States*, *supra*, at pp. 271, 276, it was observed that the right to counsel and the privilege against self-incrimination have "a substantive affinity" and are "co-extensive in time". The present case is a clear-cut example of how intimately the two constitutional safeguards are linked and demonstrates that to insure the preservation of the latter the former must be granted.

There was introduced at the trial, over objection and exception, as has been said, the testimony given by Johnson, Lofton and petitioner at the magistrate's hearing. This was done in an unusual way in that the District Attorney read to various Commonwealth witnesses page after page of the earlier transcript and then asked whether the witness recalled those questions and answers from the hearing which had been held almost four months before. In each instance the witness had an apparently exact and complete recollection.

It is clear from this testimony, and indeed it has never been denied in the case, that the accused were not repre-

sented by counsel at the magistrate's hearing, were not informed of their right to counsel and were not advised of their right to cross-examine. The District Attorney paid brief lip service to the constitutional requirements by informing the three men at the beginning of the hearing that they did not have to testify,[9] and yet after Detective Kelly, Johnson and Lofton had testified, the District Attorney, without further ado, caused petitioner to be sworn (R. 57) and questioned him as follows (R. 58):

> "Q. *Do you want to say anything to his Honor?*
> A. *No, sir.*
> Q. *Can you add anything?*
> A. *No, sir.*
> Q. *You don't want to add anything?* Do you agree with the testimony that these men have given in court?"

Since the District Attorney thus persisted in questioning petitioner and since the magistrate failed to intervene to prevent this interrogation, despite the unequivocal nature of petitioner's desire and attempt to claim his privilege he was thus unconstitutionally compelled to testify. Actually the magistrate's hearing became nothing more than a continuation of the same coercive process to which petitioner had already been subjected for five days, and served only further to "break" petitioner's will. The police had kept him on the grill before because "he did not give the answers the right way" (R. 26) and now, with no one around except the same detectives who had been his inquisitors (R. 145), the authorities went through the form of advising him of his constitutional privilege only to thrust aside delib-

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[9] It was said in *Haley* v. *Ohio*, 332 U. S. 596, 601: ". . . we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

erately his effort to exercise that privilege. Apparently the District Attorney also felt that petitioner's "No, sir" was not "giving the answers the right way."

It cannot be doubted that had petitioner been represented at the time his counsel could have secured to him his constitutional immunity. In fact, the court en banc has said that he could have successfully claimed his privilege had he remained silent (R. 286). Apparently a flat negative reply to the question, "Do you want to say anything to his Honor?", is insufficient, but it is a travesty, indeed, to deny counsel to an indigent accused and then hold him to the niceties of phraseology that a skilled practioner might use.

This is "squeezing out conviction . . . by means unconstitutional if used at trial" and, as was said in *Wood v. United States, supra* at p. 376:

> "That the hearing in a magistrate's proceeding does not deprive it of judicial quality. Neither does it invest the court with power of inquiry or freedom from constitutional restrictions greater than the trial court possesses."

We have already set forth our view that the testimony given by Johnson and Lofton at the preliminary hearing was inadmissible at petitioner's trial (supra, Point II, pp. 28-30). We here submit that the remaining bit of testimony from the magistrate's hearing, that of petitioner himself, is also inadmissible since it is violative of his constitutional privilege against self-incrimination.

V

The Admission in Evidence of Testimony Concerning the Purported Reenactment of the Crime Violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Even after petitioner had been put through the travesty of the magistrate's hearing on June 7, 1946 and after he

had been committed without bail to the county prison he was granted no surcease from the continuing, coercive methods of the police. It is admitted that they held him, without court order and still incommunicado, for another four days and that he was not delivered to the relative sanctuary of prison till June 12 (R. 137-138, 180). The purpose behind this further detention was to subject petitioner and his alleged confederates to a so-called reenactment of the crime.

If the police are to be believed, petitioner, Johnson and Lofton had voluntarily made a clean breast of everything by June 8, for, supposedly, signed written confessions had then been obtained after five days of questioning and "ironing out the details" (R. 90). In addition, full "confessions" had been obtained in open court before the magistrate on June 8. And still the police were not satisfied. There had to be a reenactment of the crime because, as Sgt. Riccardi admitted, "it is a matter of evidence in our homicide case" (R. 97).

These facts bring at once to mind the very similar situation in *Malinski* v. *New York*, 324 U. S. 401, in which this Court reversed a conviction because it had been obtained by the use of evidence secured in violation of the Due Process clause. The significance of that decision for the present case is particularly emphasized in the opinion of Mr. Justice Rutledge, concurring in the reversal as to Malinski (pp. 422-428). In language that is peculiarly relevant to the plight of the present petitioner, it is asked, "Why was he detained illegally for three days and four nights after he admittedly had told 'everything'?" (p. 424). The answer, of course, is that the police were using "a pattern typical of 'third degree' method" (p. 426) in which everything "was checked, elaborated, verified and distilled" (p. 427). Petitioner, like Malinski, "knew that he was 'on the grill' and

would continue so until he made whatever statement might satisfy the officials who had him in charge" (p. 428).

It would seem self-evident that when petitioner was committed by the magistrate he should have been delivered forthwith to the county prison and that, once there, he could not, without an express court order, have been taken by the police for the reenactment.[10] His rights are not different from those of any other citizen because he is accused of a crime and, as was said in a well-known Pennsylvania lower court decision (*Commonwealth* v. *Brines*, 29 District Rep. 1091), "An accused, but unconvicted prisoner is not to be bundled about the county at the beck and call of every policeman or prosecutor who may wish to see him."

In short, our contention is that the evidence obtained at the reenactment of the crime was inadmissible at the trial because it was obtained in the course of a single, continuing, inquisitorial process that began on June 3 and did not end until June 12. Moreover, we contend that it was improper and illegal for the police to hold petitioner after his commitment by the magistrate, and since, if he had not been present at the reenactment the testimony of what occurred in his absence would be inadmissible, the Commonwealth may not take advantage of the wrongdoing of its officers to make admissible statements procured in the involuntary presence of petitioner.

As was said in *Malinski* v. *New York*, *supra* at pp. 422-423:[11]

> "Whatever may be the rule as to the use of evidence secured by means merely unlawful, in my judgment the Constitution does not tolerate the use of evidence obtained by unconstitutional methods, including coercive

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[10] See Pennsylvania's Habeas Corpus Act of February 18, 1785, 2 Sm. L. 275, § 12, 12 Purdon's § 1887.

[11] Mr. Justice Rutledge's concurring opinion.

ones, to bring about a conviction for crime which is constitutional. The Constitution does not, thus nullify its own terms, setting them at war with each other."

Conclusion

It is important to society that crimes should be solved and the guilty punished, but it is equally important that we secure "conviction of the guilty by methods that commend themselves to a progressive and self-confident society" (*McNabb* v. *United States, supra* at p. 344). The guilt of the present petitioner, if guilty he be, has never been established in accordance with such methods although the Supreme Court of Pennsylvania has approved what was done in this case by an appeal to the expediency said to be demanded by "the unending warfare between the criminal and society" (R. 322). We recall, however, the words of this Court in *Malinski* v. *New York, supra* at p. 418, 419):

> "* * * we must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of the procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people * * * it is intolerable to suggest that we cannot have effective law enforcement without conduct such as this record spreads before us. The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law."

The court *en banc* in denying petitioner's motion for new trial said (R. 289):

> "*The charge of the trial court is convincing that this defendant assaulted and murdered two men, and that he is a menace to society.* We believe that he was given a fair trial which in itself is due process. While we believe that every safeguard should be thrown about

a man accused of a capital offense, nevertheless, the courts owe a responsibility to society to safeguard it from the men of the type and character of this defendant." (Italics supplied.)

We believe that this statement is flatly opposed to what this Court has said and done which has been summarized most recently in Mr. Justice Frankfurter's concurring opinion in *Haley v. Ohio*, *supra* at pp. 605, 606:

> "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. Disinterested zeal for the public good does not assure either wisdom or right in the methods it pursues. A report of President Hoover's National Commission of Law Observance and Enforcement gave proof of the fact, unfortunately, that these potentialities of abuse were not the imaginings of mawkish sentimentality, nor their tolerance desirable or necessary for a stern policy against crime. Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people. See *McNabb v. United States*, 318 U. S. 332, 342-43."

The shocking practices resorted to and admitted by the police in this case cannot be squared with the decisions of this Court to which we have referred. These decisions show clearly that any one of the grounds here raised is sufficient to require petitioner's conviction to be set aside (*Ward v. Texas*, *supra* at p. 555). When they all occur in one case

the cumulated enormity of the error is such that petitioner cannot with justice be sent to his death. The judgment of the Supreme Court of Pennsylvania should therefore be reversed.

Respectfully submitted,

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APPENDIX

Constitution of the United States Fourteenth Amendment, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the Commonwealth of Pennsylvania, Article I, § 9

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

Constitution of the Commonwealth of Pennsylvania, Article V, § 1

The judicial power of this Commonwealth shall be vested in a Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish.

Constitution of the Commonwealth of Pennsylvania Article V, § 12

In Philadelphia there shall be established, for each thirty thousand inhabitants, one court, not of record, of police and

civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be six years, and they shall be elected on general ticket at the municipal election, by the qualified voters at large; and in the election of the said magistrates no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county; and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is not exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of aldermen is abolished.

Act of March 22, 1907, P.L. 31, § 1,
19 Purdon's § 784

Whenever any person, being under indictment, charged with murder, shall make and file with the clerk of the court of quarter sessions, an affidavit, setting forth that he or she is wholly destitute of means to employ counsel and prepare for his or her defense, the judge sitting in the court of oyer and terminer, to whom such affidavit is presented, shall assign to such person counsel, not exceeding two, to represent and defend such person at the trial of the case; and when services are rendered by counsel, in pursuance of such assignment, the judge sitting at the trial of the case may allow such counsel all personal and incidental expenses, upon a sworn statement thereof being filed with the clerk of the court of quarter sessions, and also reasonable compensation for services rendered, not exceeding two hundred dollars for each counsel; which allowance of expenses and compensation shall be a charge upon the county in which the indictment in the action is found, to be paid by the county treasurer, or, where the city and county are coextensive, by the city treasurer, upon the certificate of the judge presiding at the trial of the case: Provided, That in order to be entitled to such expenses and compensation, counsel so assigned must file with the judge, sitting at the trial of the case, an affidavit that he has not, directly or indirectly,

received, nor entered into a contract to receive, any compensation for such services from any source other than herein provided.

Act of March 31, 1860, P.L. 427, § 3, as amended, 19 Purdon's § 3

In case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this commonwealth, for any offense there committed, shall escape, go into, reside, or be in any other city or county out of the jurisdiction of the judge, alderman, or justice of the city or county granting such warrant as aforesaid, it shall and may be lawful for the person to whom such warrant was originally directed, or the person having such warrant for execution, to execute the same, and arrest such offender in such city or county, out of the jurisdiction of the alderman, justice or justices granting such warrant aforesaid, and to carry the defendant before any alderman, justice or justices in the city or county in which such offender may be apprehended; and in case the offense for which such offender shall be so apprehended, shall be bailable in law by any alderman or justice of the peace, and such offender shall be willing and ready to give bail for his appearance at the next court of general jail delivery or quarter sessions, to be held in and for the city and county where the offense was committed, such alderman, justice or justices, in the city or county where such offender was apprehended shall and may take such bail for his appearance, in the same manner as the alderman or justices of the peace of the proper city or county might have done and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognizance and other proceedings to the clerk of the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognizance, and such recognizance and other proceedings shall be as good and effectual in law as if the same had been entered into, taken or acknowledged in the proper county where the offense was committed, and the same proceedings shall be had therein; and in case the offense for which such

offender shall be apprehended in any other city or county, shall not be bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper court having cognizance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so apprehending such offender shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offense was committed, there to be dealt with according to law: Provided, That the warrants so as aforesaid issued shall be stamped with the official seal of the officer issuing the same, which seal shall contain the name and official title of said officer and the state and county in which he resides.

Act of April 23, 1909, P. L. 141, § 1, 19 Purdon's, § 4

Sheriffs, constables, members of the State constabulary, or other persons authorized by the laws of this Commonwealth to make arrests, hereafter shall have the use, for a period not to exceed forty-eight hours, of borough and township lockups and city or county prisons, for the detention of prisoners until they can be disposed of according to law, if found necessary by the officer in charge.

Act of April 20, 1869, P. L. 1187, § 1, 53 Purdon's, § 6858

In all cases of arrest made by any police officer or constable of the city of Philadelphia upon any of the streets or highways of any of the cities of this commonwealth, it shall be the duty of the police officer or constable making such arrest to take the person arrested for a hearing to the office of the alderman or magistrate nearest to the place where said arrest has been made, except when the person shall be arrested for intoxication, in which case the intoxicated person shall be taken to the station-house for a hearing before the committing magistrate of the district.

Act of April 20, 1869, P. L. 1187, § 2, 53 Purdon's, § 6859

Any police officer or constable who shall violate the provisions of this act, upon conviction thereof, shall be punished by a fine of not less than fifty dollars and dismissed from office.

Act of Feb. 18, 1785, 2 Sm. L. 275, § 12, 12 Purdon's § 1887

Any person being committed to any prison, or in custody of any officer, sheriff, jailer, keeper or other person, or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from the said prison or custody, into any other prison or custody, unless it be by habeas corpus or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer, to be carried to some common jail, or where any person is sent by any judge or justice, having proper authority, to some common workhouse or house of correction, or where the prisoner is removed from one place to another within the same county, in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection or other necessity; and if any person or persons shall, after such commitment as aforesaid, make out, sign, countersign and issue any warrant or warrants for such removal, except as before excepted, then he or they shall forfeit to the prisoner or party grieved two hundred pounds, to be recovered by the prisoner or party grieved, in manner aforesaid.

"Defense in Criminal Cases Prior to Trial", an address delivered by Lemuel B. Schofield, Esq., former First Assistant District Attorney and Director of Public Safety of Philadelphia before the Philadelphia Bar Association, December 15, 1939, (Published in pamphlet form by the Association), page 3.

"The law declares it to be the duty of one who makes an arrest with or without a warrant to take the accused immediately before a magistrate or justice of the peace. As to arrests by constables or police officers of the City of Philadelphia, whether the arrest be within the city or elsewhere in the State, the Act of April 20, 1869, P. L. 1187, sec. 1, 53 PS § 6858, requires that the accused be taken for a hearing to the office of the nearest alderman or magistrate. For failure to comply, the penalty is mandatory—a fine of not less than $50 and dismissal from office. I doubt if there is a statute on our books which is more consistently violated. Were it strictly enforced half the Philadelphia police would

be out of employment, with the resultant reduction in the budget of the Department of Public Safety.

"Persons arrested by warrant usually are taken for a hearing before the magistrate or justice of the peace who issued the warrant; throughout the State those arrested without warrant are taken before a justice of the peace or alderman selected by the enforcement authorities of the particular locality. In Philadelphia, persons arrested without a warrant in the usual course of duty by a patrolman or district detectives are given hearings before the magistrate assigned to the district where the offense was committed and the magistrate holds the hearing in the station house. Where the arrest is by a police officer or detective working from central headquarters, the accused is given a hearing before the magistrate assigned to the central police court in City Hall, though this is not in compliance with the letter of the law.

"The law and the practical necessities of its enforcement are in conflict. Prisoners are not taken before the nearest magistrate nor are they given immediate hearings in many cases. Magistrates are not always on duty and do not sit continually in their offices or in police stations. The police must have some place of security where prisoners may be kept until they can be accorded a hearing. The Act of April 23, 1909, P. L. 141, 19 PS § 4, provides that those authorized to make arrests may use, for a period not exceeding 48 hours, lock-ups and prisons for the detention of persons arrested until they can be disposed of according to law.

"It will be noticed that this statute does not change the duty of the officer to accord the prisoner a hearing at the earliest possible moment, or certainly at the earliest practicable moment. But police are often not ready to proceed as soon as the arrest is made, for reasons which are perfectly obvious and proper from a law enforcement point of view. Witnesses may not be available immediately; it may not be consistent with public safety to disclose at once the nature of the evidence; other participants may be still at large, etc. The result is that sometimes prisoners are kept by the police for days or even weeks, tucked away in some remote station house or moved from place to place

and held incommunicado, with perhaps no one else aware of the arrest until it suits the convenience of the police to have a hearing. This practice has come to be known by the descriptive term, 'cold storage', though the circumstances from the prisoner's point of view are often more consistent with the other end of the thermometer. There is no justification in the law for this practice, whatever may be said in support of it from the practical standpoint."

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